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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 356

ANTHONY PROVENZANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. B)[1] is not yet reported. Opinions of the district court, ruling on petitioner's various motions, are not reported (Pet. App. C, D).

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[1] "Pet. App." refers to the various appendices to the petition for certiorari, "A.A." to the appellant's appendix and "G.A." to the government appendix in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1967. The petition for a writ of certiorari was filed on July 13, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the trial court abused its discretion in denying petitioner's second motion for a new trial based upon allegedly newly discovered evidence that one of the jurors at petitioner's trial was prejudiced.

STATEMENT

Petitioner seeks review of an order denying his second motion for a new trial based upon newly discovered evidence. He was convicted in the District of New Jersey of obstructing interstate commerce by extortion, in violation of 18 U.S.C. 1951 (the Hobbs Act). *United States* v. *Provenzano*, 334 F.2d 678 (C.A. 3), certiorari denied, 379 U.S. 947. On January 5, 1965, six days after the filing of the mandate reflecting affirmance of his conviction, petitioner moved for a new trial on the ground of newly discovered evidence that a juror, Stephen J. Cassidy, had failed to disclose his prejudice against petitioner on the voir dire examination of the jury panel. This motion was denied on March 30, 1965, after an extensive hearing, *United States* v. *Provenzano*, 240 F. Supp. 393 (D. N.J.), and the decision was affirmed by the Third Circuit on December 22, 1965, 353 F.2d 1011. Certiorari was denied on April 18, 1966. 384

U.S. 905. In that proceeding, the court, noting the intensive investigation which had been made of the jurors, directed that there be no further investigation without leave of court—a direction which was subsequently made a rule of the court (see A.A. 243-247).

1. In April, 1966, shortly after the denial of certiorari in the proceedings on the prior motion for new trial, petitioner, through new counsel, filed a motion for leave to interrogate juror Harry Hurwitz (A.A. 3-9). A hearing was held on this motion and two witnesses, William B. Bradley, president emeritus of the International Longshoremen's Association and a friend of petitioner, and Thomas Duffy, a former assistant of Bradley, testified concerning conversations with Hurwitz in 1965.[2] Hurwitz allegedly stated that there were transistor radios, television and newspapers at the hotel where the jury was quartered;[3] that the jury was disturbed by a fire which occurred at the hotel; that he had, in the course of his business as a salesman, received a check which later turned up as undisputed evidence in the trial; and that after the final vote a woman juror told him that petitioner had put her husband out of business by a ruling he had made as a labor mediator.

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[2] A third witness, Jack Sukosky testified, but his only testimony was that Hurwitz had not asked to be introduced to Duffy, as Bradley had testified.

[3] The jury had been sequestered during the trial in order to keep them from reading or hearing about the murder of Walter Glocker, a member of petitioner's union, because there were some allegations that petitioner had been responsible for Glocker's death.

When petitioner's counsel suggested that the court, of its own motion, examine the juror Hurwitz (A.A. 254), the court pointed out that the jurors had been interrogated at length on the voir dire and had deliberated a long time. He concluded that the court should not require the juror to testify without more convincing evidence of the genuineness of the alleged qualms revealed for the first time so long after verdict (A.A. 254-278).

In an oral opinion denying both the motion to examine the juror and the motion for a new trial, the court reviewed the substantial discrepancies in the testimony and stated that it had rarely encountered witnesses like Bradley and Duffy "whose contradictory statements under oath were so notable and whose demeanor in giving testimony was so unimpressive" (A.A. 315-324).

2. While an appeal was pending, petitioner moved for the issuance by the district court of a certificate that it was "inclined to grant a hearing heretofore requested." The motion was based on an affidavit of Harry Hurwitz addressed "To Whom it May Concern," dated June 30, 1966, which stated: (1) That affiant's territory was in the area of Michael Communale's office and that he had accepted a check payable to Communale which later became evidence at the trial of petitioner; (2) at least one juror knew of the shooting which took place during petitioner's trial; (3) this juror had also said that petitioner was responsible for putting her husband out of the trucking business; and (4) he and other jurors were concerned about the fire which occurred at the hotel

where they were quartered; and that all of these circumstances had prejudiced him in making up his mind as a juror (Pet. App. E).

The court conducted a hearing on this motion at which the judge, having issued subpoenas, did the questioning. (G.A. 108-109, 201). Emil Oxfeld, counsel to the American Civil Liberties Union, testified that in March 1966 Bradley had given him information obtained from Hurwitz which petitioner's then counsel had not wished to act upon. This information was to the effect that the jurors knew of the murder which occurred during petitioner's trial, that transistor radios and newspapers were in the jury room and that unmonitored television programs were seen by the jurors (G.A. 223-224, 230-233, 240).

Hurwitz was questioned by the court about the various points made in his affidavit. Concerning point (1), he stated that in the course of his business as a salesman he had received the check payable to Communale from one of his customers. Although there was no dispute about the check at trial and Hurwitz' name did not appear on it, he felt that in a way he was sort of prejudiced (G.A. 271-274). He did not recall that the court had questioned the jury panel as to their possible acquaintanceship with various persons, including Communale, whose occupation was identified and whose name was spelled out, or that he had failed to respond in any way (G.A. 296, 299-300). As to point (2), Hurwitz testified that word about the shooting came to him through juror Elizabeth Gautier, who said that she had received the information from a matron. Hurwitz remembered

that no juror had responded when defense counsel, in his summation, asked whether any juror had heard anything about the case from outside (G.A. 275-277). He admitted that the jury was under the strictest surveillance; that no matrons were allowed in the rooms at the same time as the jurors; that no transistor radios were in their quarters; that all television programs were monitored, and that nothing reached the jurors through the newspapers (G.A. 287, 288, 311). Hurwitz did not know who the murdered man was or any connection between that and the case, but felt that there was a tie-in (G.A. 320). Concerning point (3), after consulting his notes, Hurwitz testified that Mrs. Gautier had said after the trial that petitioner had forced her husband out of business (G.A. 322-324). As to point (4), Hurwitz testified that he did not associate petitioner with the fire at the hotel, but that the fire caused the jurors to be on edge (G.A. 288).

Hurwitz also testified that he had arrived at the opinion that petitioner was guilty early in the trial, before any of these matters had come to his attention (G.A. 310-312). He did not thereafter mention his prejudice to anybody, even to his wife, until he confided in Duffy, a man he knew as being vaguely connected with public relations. He believed that Duffy approached him on the subject (G.A. 270, 281-283, 307).[4] Duffy introduced him to Bradley, who told

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[4] It appeared from the testimony of petitioner's attorney Franzblau that Duffy was a licensed private investigator (G.A. 256).

him to communicate with the American Civil Liberties Union, which he did more than a year later (G.A. 267-270, 301-302). The June 30 affidavit, Hurwitz stated, was typed by himself upon a manual typewriter (G.A. 264-265, 291). Later, the Federal Bureau of Investigation, at the court's request, examined the letter and reported that it was not typed on a manual typewriter, but upon an IBM "Executive" electric typewriter (G.A. 359).

The court denied petitioner's motion, orally giving its reasons therefor (G.A. 335-357), and then subsequently supplementing them with a written opinion (Pet. App. D). The court reviewed the testimony of Hurwitz and the admitted lack of any connection between the matters mentioned in his affidavit and his own belief in petitioner's guilt, which preceded any of the occurrences mentioned. Hurwitz, the court stated, did not give the impression that he was "a person speaking with complete candor, and with sincerity out of any spirit of remorse for some wrongful act that he had done." The court also noted that in connection with a prior proceeding, the husband of juror Gautier had been interviewed by petitioner's investigator for over an hour and apparently nothing worthy of being called to the court's attention had resulted from that investigation. The court concluded that petitioner's motion should not be granted because no credible evidence of prejudicial conduct had been presented and because the alleged newly discovered evidence was known to exist at the time of the previous hearing and was either deliberately with-

held or was considered by prior counsel to be of so little consequence that it was not brought to the attention of the court (Pet. App. 24a-26a).

ARGUMENT

While petitioner criticizes the trial judge for not ordering juror Hurwitz to testify at the time of the first hearing on this motion, (Pet. 5) there can be no error in this regard since Hurwitz was subsequently called to testify.[5] Thus, the issue is reduced to two questions: (1) whether the testimony of Hurwitz showed such prejudice as would require the granting of a new trial or (2) whether the court should have permitted examination of the juror Gautier, or any other juror.

In view of the fact that Hurwitz admitted that he had come to the conclusion that petitioner was guilty before any of the allegedly prejudicial matters had come to his attention, it is difficult to see how petitioner could have been prejudiced, even if Hurwitz's testimony concerning these incidents is accepted. Moreover, the record reveals that there was ample reason for the court to question the veracity of Hurwitz and to refuse credit to his testimony. Since Hurwitz' testimony relates primarily to matters which allegedly came to the jury's attention after they had been sequestered, it is significant to note

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[5] In view of the substantial discrepancies in the testimony of Bradley and Duffy, outlined in the trial court's opinion (Pet. App. C), there was no error in the judge's original refusal to order Hurwitz to testify.

that, in its original review of petitioner's conviction, the Third Circuit found that "the precautionary measures taken by the court below were sufficient to render insubstantial any question concerning the possibility that the jurors read or heard any matter likely to be prejudicial to Provenzano before the end of the trial." See 334 F. 2d at 696.

The remaining question is whether the trial court abused its discretion in refusing to call in the juror Gautier or any or all of the remaining jurors for questioning. The reason for hesitancy in allowing a juror to impeach his own verdict was stated in *McDonald* v. *Pless*, 238 U.S. 264, 267-268, a civil case, in the following language:

> But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—the destruction of all frankness and freedom of discussion and conference.

While in criminal cases the countervailing consideration of fully safeguarding the rights of the accused excludes the possibility of laying down any

general rule, *United States* v. *Reid*, 12 Howard 360, 366; *Mattox* v. *United States*, 146 U.S. 140, 147-149; *Remmer* v. *United States*, 347 U.S. 227, the courts have always been reluctant to intrude into this area, except for the most compelling reasons. See, *e.g.*, *Hyde* v. *United States*, 225 U.S. 347, 383-384; *Hendrix* v. *United States*, 219 U.S. 79; *Cunningham* v. *United States*, 356 F. 2d 454 (C.A. 5), certiorari denied, 384 U.S. 952; *Klimes* v. *United States*, 263 F. 2d 273 (C.A.D.C.); *Rees* v. *Payton*, 341 F.2d 859 (C.A. 4); *Brown* v. *United States*, 224 F.2d 845 (C.A. 6), certiorari denied, 350 U.S. 912; *United States* v. *Furlong*, 194 F.2d 1 (C.A. 7), certiorari denied, 343 U.S. 950; *Parsons* v. *United States*, 188 F.2d 878 (C.A. 5); *Medina* v. *United States*, 254 F.2d 228 (C.A. 9), certiorari denied, 358 U.S. 846.

The circumstances here patently did not require the recalling of Mrs. Gautier or the other members of the jury for questioning. Even on Hurwitz' testimony, she said nothing in her alleged conversation with him to connect the shooting with the case at hand. A full interview of her husband by petitioner's investigator, before the proceeding, apparently failed to disclose the supposed slight which allegedly prejudiced Mrs. Gautier. Thus, the evidence adduced was inadequate to justify recalling the jury. Cf. *United States* v. *Allied Stevedoring Corp.*, 258 F.2d 104 (C.A. 2), certiorari denied, 358 U.S. 841.

In view of the fact that petitioner's counsel was aware as early as March, 1966, when the original new trial motion was pending in the district court, of the allegation that the jury knew of the murder

but chose not to raise the issue, there was no abuse of discretion in the rulings of the trial court. *United States* v. *Johnson*, 327 U.S. 106; *Holt* v. *United States*, 218 U.S. 245, 250-251; *United States* v. *Hoffa*, 247 F. Supp. 692, 699-700 (E.D. Tenn.), affirmed May 2, 1967, C.A. 6, No. 16567.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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